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No. 81-2196

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS AND NEW YORK SHIPPING ASSOCIATION, INC.,
Petitioners,

v.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC., NEW YORK FOREIGN FREIGHT FORWARDERS AND BROKERS ASSOCIATION, CONSOLIDATED FORWARDERS INTERMODAL CORPORATION, AMERICAN IMPORTERS ASSOCIATION AND INTERNATIONAL ASSOCIATION OF NVOCCS,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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RESPONDENT INTERNATIONAL ASSOCIATION OF NVOCCs' OPPOSITION TO PETITION FOR A WRIT

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QUESTIONS PRESENTED

This case presents no novel or significant questions for adjudication by this Court, but rather presents only questions which have been addressed, analogously, by this Court, and which the court below has answered in accordance with this Court's resolution of those analogous questions.

The questions presented are:

1. Whether tariff provisions of an ocean carrier, conceded to be in violation of federal shipping law, are automatically entitled to a nonstatutory labor exemption from federal shipping law merely because the tariff provisions repeat verbatim, or otherwise implement, provisions in a collective bargaining agreement?

2. Whether it is proper, in determining the question of nonstatutory labor exemption under federal shipping law, to consider the effects of tariff provisions implementing collective bargaining terms on entities outside the bargaining group?

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Respondent International Association of NVOCCs respectfully requests this Court to deny the Petition for a Writ of Certiorari seeking review of the judgment entered in this case on March 2, 1982 by the United States Court of Appeals for the District of Columbia.

STATEMENT OF THE CASE

This case is another one in a long line of attempts, by vessel operators and the union representing their employees, to misplace the burden of the results of technological change in the ocean transportation industry on one small segment [1] of this industry who service small shippers, without the slightest evidence anywhere that this small segment caused any part of the results of the technological change. The instrument chosen by the employers and the union was a set of rules, the 50 mile container rules, that were on their face, and as implemented, unjustly discriminatory and in violation of several sections of the Shipping Act, 1916 as amended [2] (the Act) and the Intercoastal Shipping Act, 1933 as amended, [3] as found by the Federal Maritime Commission. [4]

In finding violations of the several sections of the shipping laws, the Commission also determined that the 50 mile container rules were not entitled to the nonstatutory labor exemption. The court below affirmed the Commission's jurisdiction over the rules and the Commission's denial of the nonstatutory labor exemption. [5] The court below, however, (Judge MacKinnon dissenting) [6] remanded the case to the Commission for an "opportunity to reconsider its previous determination in light of "two

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[1] The Rules on Containers are primarily directed against NVOCCs (non-vessel operating common carriers) who consolidate less-than-containerload (LCL) shipments for shippers who do not have enough cargo to fill a container. App. C, 94a, 95a; App. A, 6a, 7a.

[2] 46 U.S.C. § 812 Fourth, 815 First, 817(a)

[3] 46 U.S.C.S. 845(a)

[4] App. B, 48a, *et seq.*

[5] App. A.

[6] App. A, 40a.

Supreme Court decisions, *FMC* v. *Pacific Maritime Association* 435 U.S. 40 (1978) *(PMA)* and *NLRB* v. *International Longshoremen's Assn.*, 447 U.S. 490 (1980) *(ILA)*. The Commission filed its Report and Order on Remand on May 19, 1982 without substantive change in the Commission's earlier determination. The Commission Report and Order on Remand is pending before the court below on cross motions for summary disposition.

REASONS WHY THE WRIT SHOULD BE DENIED

1. This Court Has Already Determined That Collective Bargaining Agreements Are Not Exempt From Shipping Laws

Petitioners seek to have reviewed the question whether national labor and shipping policies require that tariff provisions of ocean carriers subject to federal shipping laws be automatically entitled to a nonstatutory labor exemption from shipping law merely because the tariff provisions incorporate or implement provisions of a collective bargaining agreement.

This Court held in *PMA* that national labor policy does not require exempting collective bargaining agreements from the filing and approval requirements of Section 15 of the Shipping Act. Clearly, since this Court has granted no automatic labor exemption from the shipping laws for collective bargaining agreements themselves, there is even less rationalization for granting an automatic labor exemption for carrier tariffs implementing such agreements.

This Court further held in *PMA* the Commission acted properly in determining the basis on which it would recognize a labor exemption and this Court cited with approval the criteria defined by the Commission in *United Stevedoring Corp.* v. *Boston Shipping Ass'n.*, 16 FMC 7 (1982) *(Boston Shipping)*

One of the criteria, that the collective bargaining agreement not impose terms on entities outside of the collective bargaining group, is clearly a factor here as in *PMA*. The court below compared the imposition of terms by shipping employers on third parties in *PMA* with the imposition of terms here on NVOCC consolidators and other shipping customers of ocean carrier employers. The Court cited the burdens the Rules imposed on NVOCC consolidators, contrasted these burdens with the free movement of containers across the piers without ILA rehandling (i.e. stripping and restuffing containers) whereby small shippers could then, as the Court stated,

> take full advantage of the benefits of container shipping. In contrast the stuffing and stripping requirements allegedly increase shipping delays and labor costs, augment the risk of loss, pilferage, and damage in transit due to improper storage and deprive the shippers of the special services provided by consolidators. (App. A, 14a)
>
> . . . the Rules have direct and probable effects on shippers' interests and on competition in the shipping industry, . . . The Record fully documents the impact that enforcement of the Rules would have on importers, exporters, consolidators, distributors and others who transport goods by sea. Consolidators are competitors as well as customers of the steamship lines, offering alternative arrangements for ocean transportation of smaller shipments. Those consolidating companies which previously operated within the 50 miles zone are deprived of business under the Rules . . . (App. A37a, 38a). NVOs and distributors previously operating within the 50 miles zone have been severely affected and in some cases have been forced to cease operations. (App. A, 14a).

Thus, in its denial of a labor exemption the Commission had taken account of the imposition of terms, as well as the serious and pervading effects of the Rules, on parties

outside of the bargaining group. The Court below correctly affirmed the Commission's finding that the Rules do not satisfy the *Boston Shipping* criteria. (App. A, 35a).

2. There Is No Conflict With Decisions Of Other Courts

Petitioners cite the decisions in two antitrust cases [7] in support of their contention that the shipping law decision by the court below conflicts with those other circuits.

There is no conflict. The court below succinctly gave the answer to Petitioners in its citation of this Court's holding in *PMA*, thus

> The Supreme Court has recognized that, although antitrust law precedents served as a model, they do not control the scope of the shipping law exemption for labor agreements:
>
> [S]ince the Shipping Act contains its own standards for exempting and for approving and disapproving agreements between carriers, and because the ultimate issue in cases such as this is the accommodation of the Shipping Act and the labor laws, rather than the labor laws and the antitrust laws, it will not necessarily be a misapplicaton of the statutes if the exemption for collective-bargaining contracts from Shipping Act requirements is not always exactly congruent with the so-called labor exemption from the antitrust laws as understood by the courts.
>
> *FMC* v. *Pacific Maritime Ass'n*, *supra* note 84, 435 U.S. at 63. (App. A, 30a)

Without belaboring the point, *PMA* clearly establishes, as the court below pointed out, exempting the

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[7] *Intercontinental Container Transport Corp.* v. *NYSA*, 426 F.2d 884 (2nd Cir. 1970) *(ICTC) Consolidated Express, Inc.* v. *NYSA*, 602 F.2d 494 (3rd Cir. 1979) *vacated and remanded*, 448 U.S. 901 (1980) (Conex)

Rules from antitrust statutes, as in *ICTC*, does not mean they must be exempt from shipping laws. (App. A, 39a)

Further, contrary to Petitioners' misleading contentions there is no irreconcilable conflict in the Third Circuit's decision in *Conex*. The Court there neither granted an automatic labor exemption from antitrust laws for the Rules, nor automatically denied the exemption, but rather held that a determination of the availability of the exemption must be made in the first instance in the district court.

The alleged conflict with *ICTC* and *Conex* is neither "real" nor "perduring" (Pet. Br. p. 12)

CONCLUSION

The court below correctly affirmed the Commission's jurisdiction over the Rules and the Commission's denial of a labor exemption under the shipping laws and therefore, for all of the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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